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ZONING LAWS: THE PRIVATE CITIZEN AS AN ENFORCEMENT OFFICER

*Frank Eugene Brown, Jr.**

Be it enacted by the General Assembly of Virginia, as follows:
"That all zoning laws shall henceforth be abolished and neither local governments nor this state shall exercise any control over growth, development or land use in any city or other political subdivision in Virginia."

At first blush this would appear a reactionary, unthinkable concept, an invitation to chaos. A legislator in Virginia who proposed such a change might well be shuttled home for a "much needed rest." Yet, this idea does have its outspoken proponents who are well recognized in the field of land use. One of the more notable is Mr. Bernard H. Siegan, who has expressed the opinion that urban planning can often be best served by eliminating zoning laws and permitting the market to totally dictate the course of development in a particular area. Mr. Siegan holds strongly to the view that zoning laws permit local politics and favoritism to dictate land use, resulting in an irrational distribution of residential, commercial, governmental and recreational facilities, a situation he claims would not obtain were the machinery of the market left to its own devices.¹

Whatever the merits of Mr. Siegan's position, zoning laws are a fact of life in Virginia and there is no serious movement afoot advocating their total repeal. However, recent years have seen the public take an increasingly active interest in the administration of local zoning ordinances, and many would agree with Mr. Siegan's

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1. Address by Bernard H. Siegan, Northern Virginia Builders Association Monthly Meeting, March 8, 1973. Mr. Siegan, a Chicago attorney, is a strong proponent of the "no zoning" concept utilized by several American cities, notably Houston, Texas. This "Adam Smith approach" to urban planning is based upon the belief that governmental interference with the machinery of the market necessarily results in a less than perfect product. Mr. Siegan points out that Houston (the nation's sixth largest city and fourth in volume of construction) has generally achieved the commonly accepted goals of zoning by allowing normal economic forces to operate largely unhindered. He believes that homeowners in localities without zoning have as much, if not more protection through the use of restrictive covenants and economic controls of the market than would be achieved by zoning.

premise—that factors other than those relating strictly to land use concepts often influence land use decisions made by local governing bodies. Consequently, individuals and citizen groups have become quite vocal in their demands that zoning laws be strictly enforced, for fear that politics and favoritism will operate to the detriment of their neighborhoods. Suppose, however, that a citizen is not satisfied with a zoning decision made either by his local governing body or the officers charged with the administration and enforcement of the zoning ordinance. What remedies, if any, has he?

This article is intended to be narrow in scope and will not concern itself with remedies available to an individual who wishes to appeal a zoning decision relating to his own property,² and likewise will not deal with the possibility of utilizing the writ of mandamus in an effort to compel local officials to enforce the ordinance.³ Rather, it will explore in some detail the right of a private citizen to file a lawsuit to enforce a zoning ordinance as it relates to the property of another. Administrative remedies will be discussed only to the extent that their exhaustion is a condition precedent to access to the courts.⁴

The rapid growth and development experienced in recent years, particularly in urban areas, coupled with the increased awareness and interest of the public in the administration of zoning laws, makes this a subject of great importance to the practitioner which, as yet, has not received the benefit of any definite judicial or legislative guidelines.

I. SOME BASIC ZONING CONCEPTS

Zoning is nothing more than the power of a political subdivision to divide the territory under its jurisdiction into districts and regulate the use to which land within each district may be put.⁵ The

2. For decisions involving the use of declaratory judgment to complain of a zoning decision affecting one's own property, see *infra* notes 7 & 8.

3. For a case involving the use of mandamus by a property owner, see *Ours Properties, Inc. v. Ley*, 198 Va. 848, 96 S.E.2d 754 (1957).

4. For a discussion of the administrative appeal to a board of zoning appeals, see Note, *The Aggrieved Person Requirement in Zoning*, 8 WM. & MARY L. REV. 294 (1967).

5. VA. CODE ANN. § 15.1-486 (Repl. Vol. 1973) provides:

Zoning ordinances generally; jurisdiction of counties and municipalities respectively. The governing body of any county or municipality may, by ordinance,

purpose of zoning is to promote the health, safety, morals and general welfare of the community, to protect and conserve the value of buildings and to encourage the most appropriate use of the land.⁶ Zoning ordinances which do not effectuate these purposes, or are so vague that they provide no ascertainable standards for their administration, are invalid;⁷ however, the expansive range of zoning objectives and the strong presumption of validity of the ordinance obviously renders an attack on these grounds quite difficult.⁸

divide the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and area as it may deem best suited to carry out the purposes of this article, and in each district it may regulate, restrict, permit, prohibit, and determine the following:

(a) The use of land, buildings, structures and other premises for agricultural, commercial, industrial, residential, flood plane and other specific use;

(b) The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;

(c) The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used;

(d) The excavation or mining of soil or other natural resources; and

(e) Sedimentation and soil erosion from nonagricultural lands.

For the purpose of zoning, the governing body of a county shall have jurisdiction over all the unincorporated territory in the county, and the governing body of a municipality shall have jurisdiction over the incorporated area of the municipality.

6. VA. CODE ANN. § 15.1-489 (Repl. Vol. 1973); *Boggs v. Board of Supervisors*, 211 Va. 488, 178 S.E.2d 508 (1971); *Southern Ry. v. City of Richmond*, 205 Va. 699, 139 S.E.2d 82 (1964); *City of Richmond v. Board of Supervisors*, 199 Va. 679, 101 S.E.2d 641 (1958).

7. *Boggs v. Board of Supervisors*, 211 Va. 488, 178 S.E.2d 508 (1971) (Board's refusal to rezone plaintiff's land was arbitrary and capricious); *Andrews v. Board of Supervisors*, 200 Va. 637, 107 S.E.2d 445 (1959) (ordinance held invalid because too general and "wholly vague," providing no uniform standards for the issuance of permits); *Board of Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959) (ordinance held unreasonable, arbitrary, lacking in uniformity and therefore unconstitutional); *Board of Supervisors v. Davis*, 200 Va. 316, 106 S.E.2d 152 (1958) (Board improperly used the zoning ordinance to restrict competition; plaintiff should have been granted rezoning); *City of Alexandria v. Texas Co.*, 172 Va. 209, 1 S.E.2d 296 (1939) (prohibition against installation of floodlights in gasoline filling stations bore no relation to public health, safety, morals or general welfare).

8. *Kenyon Peck, Inc. v. Kennedy*, 210 Va. 60, 168 S.E.2d 117 (1969) (ordinance held valid and not an unreasonable, arbitrary exercise of police power); *Wilhelm v. Morgan*, 208 Va. 398, 157 S.E.2d 920 (1967) (plaintiff failed to overcome the strong presumption of legislative validity); *Southern Ry. v. City of Richmond*, 205 Va. 699, 139 S.E.2d 82 (1964) (ordinance prohibiting use of railroad's land in the manner desired held valid and constitutional); *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 192 S.E. 881 (1937), wherein a bill for declaratory judgment and injunctive relief growing out of city's refusal to rezone complainant's property, sought to quiet complainant's title to use its land in the manner

Zoning is a legislative power vested in the state which may be delegated to cities, counties and towns, and it is within the police power of the state to pass a statute authorizing the adoption of zoning ordinances by localities.⁹ A city has the right under its police power to pass zoning ordinances if the power to zone is specifically provided in its charter.¹⁰ In the case of counties, which are political

desired and to enjoin the city from interfering. Held, that the ordinance was a valid exercise of police power and refusal to rezone was warranted.

Note that in order to have standing to challenge the constitutionality of a zoning ordinance, the plaintiff has the burden of showing that he will be directly injured. He cannot litigate the rights of the community at large, and the burden is not discharged by a showing that someone else may be injured. *Kenyon Peck, Inc. v. Kennedy*, 210 Va. 60, 168 S.E.2d 117 (1969); *Fairfax County v. Parker*, 186 Va. 675, 44 S.E.2d 9 (1947). *But see City of Richmond v. Randall*, 215 Va. 506, 211 S.E.2d 56 (1975); in which the Virginia Supreme Court held that the presumption of legislative validity attaches not only to a zoning ordinance, but also to applications for special use permits where legislative bodies are empowered by law to take such actions. However, when a landowner whose special use permit has been denied shows that the existing zoning ordinance, as applied to his land, is invalid, and that the use he requested is reasonable, he has made a prima facie showing that the legislative action denying his permit was unreasonable. Under these circumstances, the burden then shifts to the legislative body to produce evidence showing that the denial was reasonable. If the evidence of reasonableness is sufficient to make the question fairly debatable, the legislative denial must be sustained. In this case it was held that the City's evidence was insufficient to make reasonableness fairly debatable.

9. *City of Richmond v. Southern Ry.*, 203 Va. 220, 123 S.E.2d 641 (1962); *National Maritime Union v. City of Norfolk*, 202 Va. 672, 119 S.E.2d 307 (1961); *Andrews v. Board of Supervisors*, 200 Va. 637, 107 S.E.2d 445 (1959); *Gorieb v. Fox*, 145 Va. 554, 134 S.E. 914 (1926), *aff'd*, 274 U.S. 603 (1927).

10. Language in two Virginia cases seems to go further and imply that a city has power to zone by virtue of the general police powers contained in its charter. *Ours Properties, Inc. v. Ley*, 198 Va. 848, 96 S.E.2d 754 (1957); *Wood v. City of Richmond*, 148 Va. 400, 138 S.E. 560 (1927). One commentator contends, contrary to the language in *Ours Properties* and *Wood*, that a city has no right to zone merely by virtue of a grant of general police power, and that unless the charter expressly authorizes the exercise of zoning powers, the city must rely upon the state enabling acts. 1 E. YOKLEY, *ZONING LAW & PRACTICE* § 2-6 (3d ed. 1965) [hereinafter cited as *YOKLEY*]. This contention appears consistent with language in several other Virginia cases, notably *City of Richmond v. Southern Ry.*, 203 Va. 220, 123 S.E.2d 641 (1962) (the enactment of zoning regulations is an exercise of the sovereign power of the state which may be specifically delegated to cities, counties and towns), and *City of Richmond v. Board of Supervisors*, 199 Va. 679, 101 S.E.2d 641 (1958) (municipal corporation may exercise the following powers and no others: (1) those granted by *express words*; (2) those necessarily or fairly implied as incidental to the express powers; and (3) those essential—not simply convenient, but indispensable—to the declared objects and purposes of the corporation).

Yokley's position would seem to be sound for another reason. Exercise of the police power is limited to the protection of public health, safety, morals and general welfare, whereas zoning ordinances, in addition to the above, may also protect and conserve the value of buildings and encourage the most appropriate use of land. *See Standard Oil Co. v. City of*

subdivisions of the state, the power to zone stems exclusively from state statutes, or so-called "enabling acts."¹¹

It is obvious that the appropriate government officials may enforce the provisions of local zoning laws,¹² and, in addition to criminal sanctions, may seek injunctive relief in a court of equity.¹³ But suppose a private citizen believes that the zoning laws are not being properly administered or enforced in some respect? What rights, if any, does he have to step in and act as something of a surrogate zoning administrator? The answer involves a detailed analysis of several related questions:

1. Since zoning was non-existent at common law, there obviously exist no common law remedies, as such, for private enforcement. But is there any common law cause of action which, in the absence of statute, may properly be engrafted upon the zoning laws to permit enforcement by a private citizen?

2. Is there any specific statutory authority permitting private enforcement of zoning laws? If such statutory authority exists, is it exclusive and mandatory, or does it merely supplement a common law remedy which may be applied to zoning laws?

Any inquiry along these lines should logically begin with a general discussion of the common law method whereby one individual could restrict the use to which the property of another could be put: the abatement of a nuisance by injunction.

Charlottesville, 42 F.2d 88 (4th Cir. 1930), holding that police powers in a city charter may only be used to protect health, safety and morals and may not be utilized to protect property values, the latter being a proper subject for zoning ordinances only.

In Virginia, this question lies largely in the realm of academia, since the enabling acts have delegated zoning power to cities, counties and towns, and the only instance in which the issue may arise would be a situation where the zoning ordinance of a city conflicted in some respect with the state statutes and the city contended that, because of its independent police powers, it was not bound to adhere to the enabling acts.

11. *Cherrydale Cement Block Co. v. County Bd.*, 180 Va. 443, 23 S.E.2d 158 (1942); 1 YOKLEY, *supra* note 10, at § 2-6. Virginia's enabling acts are found in VA. CODE ANN. §§ 15.1-427 to -503 (Repl. Vol. 1973).

12. VA. CODE ANN. § 15.1-491 (Repl. Vol. 1973); *McClung v. County of Henrico*, 200 Va. 870, 108 S.E.2d 513 (1959); *Washington & Old Dominion R.R. v. City of Alexandria*, 191 Va. 184, 60 S.E.2d 40 (1950) (dictum); *Carroll v. Arlington County*, 186 Va. 575, 44 S.E.2d 6 (1947) (dictum).

13. VA. CODE ANN. § 15.1-491 (Repl. Vol. 1973); *McNair v. Clatterbuck*, 212 Va. 532, 186 S.E.2d 45 (1972); *Fairfax County v. Parker*, 186 Va. 675, 44 S.E.2d 9 (1947).

II. COMMON LAW REMEDIES: THE INJUNCTION FOR NUISANCE

Nuisance may be broadly defined as any interference with another person's enjoyment of his property. It embraces everything that endangers life or health, or obstructs the reasonable and comfortable use of property.¹⁴ On a more theoretical plane, it has been said that nuisance is not conduct or even a condition. Rather, it is an invasion of a property interest, for which liability may be predicated upon any one of the three traditional common law categories of liability: intentional conduct, negligence or strict liability.¹⁵

There are two types of nuisance—public and private. Private nuisances afford only a tort remedy, which must be exercised by the individual whose rights have been disturbed. A public nuisance is an interference with the rights of the community at large and is a crime.¹⁶ Actions to abate public nuisances lie with the appropriate government authorities, and could include criminal prosecution as well as an action for injunction.¹⁷ However, a public nuisance may also be a tort, actionable by a private individual, if the plaintiff is able to prove that he has suffered special and distinct damage, different both in kind *and* degree from that suffered by the general public. Moreover, the damage must be direct, not merely consequential.¹⁸ The interference must be substantial and objectionable to the ordinary, reasonable man, and not merely to a plaintiff with peculiar sensitivities.¹⁹

14. *Barnes v. Graham Virginia Quarries, Inc.*, 204 Va. 414, 132 S.E.2d 395 (1963); *G.L. Webster Co. v. Steelman*, 172 Va. 342, 1 S.E.2d 305 (1939); *Bragg v. Ives*, 149 Va. 482, 140 S.E. 656 (1927).

15. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1003-04 (1966) [hereinafter cited as Prosser].

16. *Id.* at 999.

17. *Pope v. Commonwealth*, 131 Va. 776, 109 S.E. 429 (1921). *But see* *Mears v. Town of Colonial Beach*, 166 Va. 278, 184 S.E. 175 (1936), where it was held that the violation of an ordinance would not be enjoined at the behest of the town unless it were a nuisance *per se* (i.e., an act designated by the ordinance as a nuisance) or unless the violation would result in special or irreparable injury to property rights.

18. *J. H. Miles & Co. v. McLean Contracting Co.*, 180 F.2d 789 (4th Cir. 1950); *Magee v. Omansky*, 187 Va. 422, 46 S.E.2d 443 (1948); *Fugate v. Carter*, 151 Va. 108, 144 S.E. 483 (1928); *Payne v. Goodwin*, 147 Va. 1019, 133 S.E. 481 (1926); *Miller v. Truehart*, 31 Va. (4 Leigh) 569 (1833); *Beveridge v. Lacey*, 24 Va. (3 Rand.) 63 (1824).

19. Prosser, *supra* note 15, at 1002. By way of illustration of the foregoing principles, cases have held that a plaintiff cannot be heard to complain: *Drummond v. Rowe*, 155 Va. 725, 156 S.E. 442 (1931) (of an unlicensed professional activity); *Baird v. Board of Recreation*

If an action at law for damages²⁰ is inadequate relief, a plaintiff may seek the aid of equity and ask that a private nuisance be enjoined.²¹ If a plaintiff suffers special damages from a public nuisance, and thus has standing to sue, he may also seek to have such a nuisance enjoined.²²

Since zoning laws are creatures of statute, unknown at common law, there exists no common law principle that such statutes may be enforced by a private individual or government authorities through the equitable remedy of injunction. If the use of one's property in violation of a zoning ordinance constitutes a private nuisance, a plaintiff whose property is affected thereby may seek an injunction without reference to any zoning violation. The concern here, however, is with the right of a Virginia plaintiff to enjoin the use of another's property, not because such use constitutes a nuisance, but based solely upon the fact that such use is in violation of the zoning laws.²³ Accordingly, the state enabling acts must be examined to ascertain if any remedies for enforcement are contained therein and, if so, whether they are exclusive or exist concurrently with the common law right to seek injunctions in a given case. As will be shown, the nuisance principles set out above have, directly or indirectly, influenced the decisions of certain courts in this area.

III. STATUTORY REMEDIES FOR PRIVATE ENFORCEMENT OF ZONING LAWS

In addition to Virginia Code Section 15.1-491, which gives government authorities the right to enforce the ordinance, either by a criminal prosecution or by an action for injunction,²⁴ two other pro-

Comm'rs, 110 N.J. Eq. 603, 160 A. 537 (Ct. Err. & App. 1932) (of a noisy baseball game); *Daniel v. Kosh*, 173 Va. 352, 4 S.E.2d 381 (1939) (of operation of a gasoline filling station) when he has suffered no harm separate and distinct from that suffered by the community at large.

20. In *Barnes v. Graham Virginia Quarries, Inc.*, 204 Va. 414, 132 S.E.2d 395 (1963) and *G. L. Webster Co. v. Steelman*, 172 Va. 342, 1 S.E.2d 305 (1939), the court affirmed judgments when damages were shown with reasonable certainty.

21. *Fugate v. Carter*, 151 Va. 108, 144 S.E. 483 (1928); *Switzer v. McCulloch*, 76 Va. 777 (1882).

22. *J.H. Miles & Co. v. McLean Contracting Co.*, 180 F.2d 789 (4th Cir. 1950); *Fugate v. Carter*, 151 Va. 108, 144 S.E. 483 (1928); *Long's Baggage Transfer Co. v. Burford*, 144 Va. 339, 132 S.E. 355 (1926); *Miller v. Truehart*, 31 Va. (4 Leigh) 569 (1833).

23. It will be assumed that, but for the zoning ordinance, the use would be lawful.

24. VA. CODE ANN. § 15.1-491 (Repl. Vol. 1973). Cases involving governmental enforcement

visions of the enabling acts are relevant to this inquiry: sections 15.1-496²⁵ and 15.1-499.²⁶ The latter speaks generally of the right to enjoin any violation or attempted violation of the provisions of the enabling acts, or any regulation adopted thereunder, without specifying in whom such rights exists, and the relevant portion of section 15.1-496 provides that:

. . . .

Where a building permit has been issued and the construction of the building for which such permit was issued is subsequently sought to be prevented, restrained, corrected or abated as a violation of the zoning ordinance, by suit filed within fifteen days after the start of construction by a person who had no actual notice of the issuance of the permit, the court may hear and determine the issues raised in the litigation even though no appeal was taken from the decision of the administrative officer to the board of zoning appeals.²⁷

This section places several conditions upon the right to proceed under its provisions, including what appears to be a fifteen day statute of limitations and lack of actual knowledge of issuance of the permit. Although the statute does not specify the form of action permitted, the language is clearly that of injunctive relief.²⁸

The Virginia Supreme Court has not interpreted section 15.1-496 or any of its predecessor statutes,²⁹ nor do any revisor's notes or committee reports exist which would shed light on the legislative intent.³⁰ In addition, none of the highest courts of the other forty-

of zoning ordinances are collected at notes 12 & 13 *supra*.

25. VA. CODE ANN. § 15.1-496 (Repl. Vol. 1973).

26. *Id.* § 15.1-499 provides:

Any violation or attempted violation of this chapter, or of any regulation adopted hereunder may be restrained, corrected, or abated as the case may be by injunction or other appropriate proceeding.

27. *Id.* § 15.1-496. The quotation in the text is the last portion of this rather lengthy statute. The portions of the statute which preceded the quoted portion concern the procedures which property owners must follow to obtain special exceptions to a zoning ordinance or to appeal from decisions of the zoning administrator granting or denying such special exceptions.

28. Note that the statute speaks of the building construction being "prevented, restrained, corrected or abated."

29. The predecessor statutes to § 15.1-496 are collected and discussed in text accompanying notes 40-54 *infra*.

30. The author contacted the Clerk of the House of Delegates and Mr. John A. Banks, Jr., Director of Legislative Services, in an effort to locate any revisor's notes or committee reports

nine states have rendered a decision on a similar statute. Therefore, the evolution of section 15.1-496 becomes of prime importance in attempting to ascertain the effect intended by the General Assembly. The basic questions which must be answered are these:

- (1) Is the statute constitutional?
- (2) Does section 15.1-496 provide an exclusive and mandatory remedy for private enforcement of the zoning ordinances, under the conditions set out therein, or does section 15.1-499 engraft upon the zoning laws the common law remedy of injunction, with laches as the only time limitation on the right to bring an action?
- (3) In what cases, if any, must administrative remedies be exhausted before resort may be had to the courts?
- (4) What standing is necessary under section 15.1-496?
- (5) Is section 15.1-496 applicable only to situations where a specific decision of the zoning administrator is being questioned?
- (6) What effect, if any, do "staged" building permits have on the operation of the statute?³¹
- (7) What occurs if a person acquires actual knowledge of the issuance of a building permit prior to the start of construction, but after the time for appeal of the decision to issue the permit has expired?³² Along these same lines, what rights accrue to a private individual who discovers, more than fifteen days after the start of construction, that a building is being constructed in violation of the building permit?
- (8) What vested rights, if any, does the builder have in a building permit?
- (9) Since the Virginia Supreme Court has held that a building

relative to § 15.1-496 or any of its predecessor statutes. Both individuals made a search of their files from the inception of the enabling acts to present, and reported that neither revisor's notes nor committee reports exist.

31. This term is meant to refer to the situation where several building permits covering different phases of construction are issued at different times (*e.g.*, excavation permit, footing permit, shell permit, mechanical permit). This is common in commercial construction where it is often impractical to complete all of the complex plans required by the locality or municipality prior to commencing construction.

32. VA. CODE ANN. § 15.1-496 (Repl. Vol. 1973), requires that the decision of the zoning administrator be appealed within thirty days after such decision is rendered.

permit issued in violation of a zoning ordinance by an official lacking power to alter or vary the ordinance is void,³³ how can any limitation be placed upon the right to challenge construction of the offending structure?

Before it becomes necessary to consider the effect of the statute, it must first be determined whether section 15.1-496 is constitutional.

A. *Constitutionality of Section 15.1-496*

The constitutionality of zoning enabling acts and ordinances in general is well established.³⁴ However, the Constitution of Virginia provides that, "[n]o law shall embrace more than one object, which shall be expressed in its title."³⁵ The title to section 15.1-496 ("Applications for special exceptions; appeals to board; proceedings to prevent construction of building in violation of zoning ordinance") well delineates the contents of the statute; but does the "law. . . embrace more than one object. . . ."?

Statutes are, of course, presumed valid until their violation of the constitution is proven beyond all reasonable doubt, and the quoted constitutional provision has been liberally construed so as to uphold acts of the General Assembly.³⁶ Though the constitutionality is not free from doubt, taken in the context of the extremely liberal construction of article IV, section 12 of the Virginia constitution, the section would probably survive constitutional attack, since the general object of the statute seems to be the establishment of procedures for challenging decisions affecting the administration of zoning ordinances. As we shall see, however, section 15.1-496³⁷ evolved from several statutes which were originally separate code sections, and the amalgamation causes severe problems in interpretation.

33. *Segaloff v. City of Newport News*, 209 Va. 259, 163 S.E.2d 135 (1968).

34. *See Gorieb v. Fox*, 145 Va. 554, 134 S.E. 914 (1926), *aff'd*, 274 U.S. 603 (1927).

35. VA. CONST. art. IV, § 12.

36. *Parker v. Commonwealth*, 215 Va. 281, 208 S.E.2d 757 (1974); *City of Richmond v. Pace*, 127 Va. 274, 103 S.E. 647 (1920).

37. Unless otherwise noted, references to § 15.1-496 will be understood to refer to that portion of the statute giving any person without actual notice of the issuance of a building permit the right to file an action claiming violation of the zoning ordinance within fifteen days after the start of construction of the building in question. *See* text accompanying note 27 *supra*. The other paragraphs of the statute will be discussed as they become relevant.

B. Section 15.1-496—An Exclusive and Mandatory Remedy

It would seem only logical that the Virginia Legislature meant for the statute to be an exclusive and mandatory remedy, particularly since there purports to be a fifteen day limitation upon the right to file suit. It must be presumed that in enacting zoning regulations, which impose restrictions on the free use of property and are thus in derogation of the common law,³⁸ the General Assembly acted with full knowledge of the strict construction given to such statutes.³⁹ As such, it is unlikely that the General Assembly intended for an individual to be able to rely upon the general common law injunctive powers of a court of equity, or claim that such general powers had been codified in section 15.1-499, should he be barred by the fifteen day limitation. Were such the case, the fifteen day provision would be pure surplusage, a futile act on the part of the legislature.

This conclusion finds further support in the legislative history of section 15.1-496 and, since this is the only direct clue to the intent of the legislature, the derivation of the statute as it relates to access to the courts must be briefly discussed.

Although the first zoning enabling acts in Virginia were enacted in 1922,⁴⁰ the statute which forms the basis of our present enabling acts was enacted in 1926.⁴¹ While this statute applied only to cities and towns,⁴² the legislature in 1927 established similar procedures for counties, but only for those counties with specific population

38. *Wheelwright v. Commonwealth*, 103 Va. 512, 49 S.E. 647 (1905). See also *Peterson v. Zoning Bd.* 412 Pa. 582, 195 A.2d 523 (1963).

39. *Hannabass v. Ryan*, 164 Va. 519, 180 S.E. 416 (1935).

40. Va. Acts of Assembly 1922, ch. 43, at 46. The Act appeared as section 3032(a) of the Virginia Code of 1924, and authorized cities (not counties or towns) to regulate land use through zoning. No procedures of any type were established; the Act merely conferred upon cities the power to zone.

41. Va. Acts of Assembly 1926, ch. 197, at 345. This Act authorized cities and towns to zone and contained provisions, much like the present act, for appeal by a "person aggrieved" of a decision of the zoning administrator to the board of zoning appeals "within a reasonable time." *Id.* § 10, at 347. A further appeal of the board's decision to the appropriate court of record was authorized, provided that the appeal was taken within thirty days after filing of the decision by the board. *Id.* § 16, at 348.

42. The local authorities were given power, "in addition to other remedies," to institute proper action to prevent, abate, restrain or correct a violation of the local ordinance relating to the erection, construction, reconstruction, alteration, repair, occupancy or use of any building or structure. *Id.* § 22, at 349.

figures.⁴³ In 1938, the General Assembly passed a separate enabling act for all counties which did not qualify under the population requirements of the 1927 Act. The 1938 Act, however, established procedures for the presentation of complaints of "persons aggrieved" which differed from those applicable under the 1926 and 1927 Acts.⁴⁴

These two separate sections relating to counties, and the provisions relating to cities and towns, appeared in the Virginia Code of 1942. That Code merely continued in effect the earlier statutory provisions. Under these statutes, the provisions for appeal of a "person aggrieved" of a decision of the board of zoning appeals depended upon the population of the place of residence of the individual. For residents of cities or towns,⁴⁵ and for residents of counties with specified population figures,⁴⁶ the procedures were similar. Appeals from decisions of zoning administrators were taken to the board of zoning appeals.⁴⁷ Any person aggrieved by a decision of the board of zoning appeals could, within thirty days after the filing of such decision, appeal to the appropriate court of record.⁴⁸ Under these provisions, a private citizen had no right of appeal to the courts unless administrative remedies were first exhausted (appeal to the board of zoning appeals). Under Chapter 115C,⁴⁹ relating to counties in general, re-

43. Va. Acts of Assembly 1927, ch. 15, at 26. The Act applied only to counties with a density of population of more than five hundred persons per square mile. Appeals to the board of zoning appeals could be taken within fifteen days after entry of the decision appealed from (Section 12), and the provisions relating to appeal of the board's decision to a court of record were the same as those found in Va. Acts of Assembly 1927, ch. 15, section 15, at 347. Section 16 established procedures for enforcement by local authorities identical to those applying to cities.

44. Va. Acts of Assembly 1938, ch. 415, at 777. Section 7 provided that the board of supervisors, if it so desired, could establish a county board of zoning appeals. Any person or persons aggrieved by any decision of the board, or any taxpayer or county official could present a petition setting forth the grounds of the grievance to the next regular meeting of the board of supervisors. Section 8 gave the county officials the same powers of enforcement as given to cities and counties with specified populations.

45. VA. CODE ANN. § 3091(1)-(26) (1942).

46. *Id.* § 2880K-2880(11) (1942).

47. Note that residents of counties with specific population figures were required to bring an appeal within fifteen days after entry of the decision appealed from (see note 43 *supra*), while residents of cities or towns were required to appeal to the board "within a reasonable time" (see note 41 *supra*).

48. VA. CODE ANN. § 2880bb (1942) (counties with specified populations); *id.* § 3091(16) (1942) (cities).

49. *Id.* § 2880mm - 2880ww (1942).

dress from decisions of the board of zoning appeals was limited to an appeal to the next regular meeting of board of supervisors or other governing body of the county;⁵⁰ no access was allowed to the courts at all.

In 1948, section 2880v of chapter 115B, pertaining to counties with specified population figures, was amended to provide recourse to the courts in cases where a building permit had been issued and one with no actual notice of the issuance of the permit desired to prevent, restrain, correct or abate the construction of a building as a violation of the zoning law.⁵¹ The amendment was very similar to the present language of section 15.1-496, but provided that suit must be filed within *thirty days* after the start of construction. The other provisions of the 1942 Code previously discussed remained unchanged.

The Code revision of 1950 continued the tripartite organization of the enabling acts.⁵² The pertinent substantive content of these Acts remained unchanged with one exception. Residents of counties in general, for the first time, were granted the right to appeal to the appropriate circuit court within thirty days after the filing of the decision of the board of zoning appeals.⁵³ With this change all Virginia residents enjoyed the right to judicial review of the board's decision. It is worthy of note that the article pertaining to counties with specific populations preserved the provisions of the 1948

50. *Id.* § 2880ss (1942).

51. *Id.* § 2880v (Cum. Supp. 1948). The statute read in part:

.....
Provided that in any case where a building permit is issued by the administrative officer, and the construction of the building for which such permit was issued is subsequently sought to be prevented, restrained, corrected or abated as a violation of a zoning law by suit filed within thirty days after the start of construction by a person who had no actual notice of the issuance of the permit, the court may hear and determine the issues raised in the litigation even though no appeal was taken from the decision of the administrative officer to the Board of Zoning Appeals.
.....

52. *Id.* §§ 15-819 to -843 (1950) (applying to cities and towns); *id.* §§ 15-844 to -854 (1950) (applying to counties in general); *id.* §§ 15-855 to -885 (1950) (applying to counties with specific population figures). Actually, the zoning enabling acts of 1950 included a fourth section (§§ 15-886 to -890) which contained special provisions for counties adjoining cities with a population of 180,000 or more. None of these provisions are relevant to this discussion.

53. *Id.* § 15-850 (1950). Section 15-850.1 allowed persons residing in counties with a density of population in excess of two thousand per square mile to petition the board of supervisors to review a decision of the board of zoning appeals prior to appealing to the circuit court.

amendment to section 2880v of chapter 115B, including its requirement that suits be filed within thirty days after the start of construction. These provisions were found in section 15-867.1 of the 1950 Code.

In 1962, the numerous statutes cited above were compressed into sections 15-968.10 and 15-968.11 of the Virginia Code.⁵⁴ Distinctions between cities and towns, counties generally and counties with certain specific populations were abolished. All of the remedies previously cited were set out in sections 15-968.10 and 15-968.11 rather than being the subject of separate sections as before. Section 15-968.10 included the prior sections 2880v and 15-867.1, and provided that a person with no actual notice of the issuance of a building permit could file a suit to prevent the construction of a building as a violation of the zoning ordinance, but significantly *shortened* the time for filing such suit from the previous thirty day limitation to a fifteen day limitation. These two sections ultimately became sections 15.1-496 and 15.1-497, which are in effect today.

In view of the history of section 15.1-496, which provides the only source of legislative intent, it seems clear that the statute provides an exclusive remedy and is mandatory, and those seeking to file an action which comes within its purview are bound by the fifteen day limitation. The statute has been revised many times over the years, indicating a great deal of thought on the part of legislators. It was not until 1950 that all areas of the state were given the right to appeal a decision of the board of zoning appeals to the appropriate court of record. More significantly, until 1962, direct access to the courts for enforcement of the zoning laws relating to construction of a building, which action first became possible in 1948, was restricted to those individuals residing in counties with specific population figures. In 1962, when the remedy became generally available, the time for filing suit was shortened to the present fifteen day limitation.

The provisions of the enabling acts which granted access to the courts to private individuals (until 1948, only as an appeal from the board of zoning appeals) were originally, and for some time thereafter, set out in three separate sections of the Code, with rights

54. *Id.* §§ 15-968.10 & 15-968.11 (Cum. Supp. 1962).

depending upon an individual's place of residence. The conclusion seems inescapable that the legislature believed that access to the courts by private individuals to contest zoning laws was nonexistent absent a specific statutory grant of such a right. Such grants carefully prescribed and limited the conditions for the filing of suit by a private individual. It is submitted that such rights of access were intended to be, and are, exclusive and jurisdictional. One noted writer in the field of zoning has stated: "It is to be borne in mind that—of course—where a specified form or manner of procedure is established by state or charter or ordinance provisions, *such respective method must* be pursued."⁵⁵

IV. LIMITATIONS OF SECTION 15.1-496

It is evident from the language of section 15.1-496 that some rights are conferred upon private citizens to file an action to prevent, restrain, correct or abate the construction of a building, which construction is allegedly in violation of a zoning ordinance. Beyond this, the import and effect of the statute are far from clear.

In the brief paragraph which grants direct access to the courts to enjoin construction of a building allegedly in violation of the zoning laws (hereinafter referred to as the "direct access provision"), section 15.1-496 raises far more questions than it answers, and this writer does not pretend to possess the prescience necessary to definitively delineate the parameters of the statute. However, certain basic conclusions may be drawn with regard to the extent of the rights conferred upon an individual proceeding under this section.

A. *Objections to the Use of a Building*

On its face, the rights provided by the direct access provision of section 15.1-496 are limited to those situations where the construction of the building is sought to be prevented, restrained, corrected or abated as a violation of a zoning ordinance. The statute is silent with regard to the right to complain about the *use* contemplated for the building. It could be argued that the act encompasses use, on the theory that if the use permit has been illegally issued, and is therefore void,⁵⁶ the building permit issued thereunder is also void,

55. METZENBAUM, *THE LAW OF ZONING* 147 (2d ed. 1955) (emphasis in original).

56. See text accompanying note 33 *supra*.

and consequently the building is being constructed in violation of the zoning ordinance (*i.e.*, without either a valid use or building permit). However, this involves a rather tortured interpretation of the statute, and it is believed that section 15.1-496 contemplates only complaints regarding the actual physical construction of a building. This interpretation is bolstered by the fact that the public has at least constructive notice of the issuance of all use permits because of the requirement of a public hearing after published notice. However, once a use permit is in existence, the issuance of a building permit is a mere ministerial act if the plans supplied conform to the building code.⁵⁷ Hence, there is no requirement for any notice to be given as building permits are issued. Objections to the issuance of a use permit, then, can be properly aired before the governing body, while the same opportunity does not exist with regard to the building permit.

B. *Decision of the Zoning Administrator*

Since the majority of section 15.1-496 is concerned with decisions of the zoning administrator and appeal of those decisions, is direct access to the courts limited to the challenge of a particular decision of the zoning administrator, such as an interpretative ruling regarding construction? An examination of the direct access provision of section 15-867.1 of the 1950 Code reveals that the predecessor statute of section 15.1-496 began as follows: "In any case where a building permit is issued *by the administrative officer*, and construction of the building for which such permit was issued is subsequently sought to be prevented, restrained, corrected or abated as a violation of a zoning law. . . ."⁵⁸ Hence, it is logical to assume that section 15.1-496 is concerned with the challenge of decisions of the zoning administrator, but that the decision contemplated is the decision to issue the building permit itself, without reference to, or requirement to specifically challenge, any specific determination which may have influenced that decision.⁵⁹

57. *State ex rel. Great Lakes Pipe Line Co. v. Hendrickson*, 393 S.W.2d 481 (Mo. 1965); *Vagoni v. Brady*, 420 Pa. 411, 218 A.2d 235 (1966); *Herskovits v. Irwin*, 99 Pa. 155, 149 A. 195 (1930).

58. VA. CODE ANN. § 15-867.1 (1950) (emphasis added).

59. Actually, in most cases numerous governmental departments must concur that the structure is in conformance with the zoning ordinance and the use permit, but the overall responsibility and final determination rests with the zoning administrator.

C. *Actual Notice of the Issuance of the Building Permit: When Acquired*

In order to avail himself of the direct access provision of section 15.1-496, a complainant must show that he had no "actual notice of the issuance of the [building] permit." However, at the time suit is filed, the party will undoubtedly have actual notice of the existence of the building permit (and hence actual notice of its issuance at some prior time), if for no other reason than construction will have begun and notice of the permit will have been tacked to a tree or otherwise prominently displayed at the construction site. Since the statute speaks of actual notice of the *issuance*, rather than the *existence* of the permit, it undoubtedly refers to actual notice *at the time of issuance*. Otherwise, it would be possible to have a situation in which a person receives actual notice of the existence of the permit prior to construction commencing but after the thirty day period for appeal of the zoning administrator's decision had expired, leaving the individual without any remedy: he cannot appeal to the board of zoning appeals, and cannot file suit under the direct access provision because of his actual notice. It is not believed that such an interpretation was contemplated by the General Assembly.

There are numerous situations between the two extremes which could be posited. For example, an individual may obtain actual notice of the existence of the building permit a day or two after it is actually issued. In this circumstance, he would have his choice of two remedies: he could appeal to the board of zoning appeals, and then to the appropriate court of record should the decision of the board be adverse, or he could utilize the direct access provision. This contention is fortified by the fact that section 15.1-496 authorizes direct access to the court by one with no actual notice of the issuance of the building permit "even though no appeal was taken from the decision of the administrative officer to the board of zoning appeals." The quoted portion of the statute would have no meaning unless it contemplated a situation where a person would have the *option* to appeal to the board (knowledge of the issuance of the permit having been obtained prior to the expiration of the thirty day appeal period), but would not be *required* to do so (knowledge not having been obtained at the time the permit was issued).

In most cases, the practitioner would be well advised to pursue the administrative remedies in such a situation. Although it may be

argued that exhaustion of administrative remedies was not required under the facts of the case, the pursuit of such remedies precludes any defense arguments along these lines and it is submitted that some judges feel, consciously or subconsciously, that one who has exhausted his administrative remedies comes into court with particularly clean hands. In addition, it would appear that the complainant has everything to gain and nothing to lose by pursuing the administrative remedies first. If he comes into court under the direct access provision, he is saddled from the beginning with the presumption that the decision of the zoning administrator is valid.⁶⁰ If he appeals the administrator's decision to the board of zoning appeals and loses, his position would be approximately the same on appeal to a court of record. However, should he prevail before the board of zoning appeals, his opponent would, on appeal to the circuit court, be forced to overcome the weight and presumption of validity which would attach to the decision of the board. As always, the final decision in such matters must rest with the good judgment of the particular practitioner, as he is familiar with the local courts and boards and is thus in the best position to evaluate his chances of success and the risks involved in each possible course of action.

D. Exhaustion of Administrative Remedies

It appears that if a person has actual notice of the issuance of a building permit, as previously defined, he must exhaust his administrative remedies by an appeal to the board of zoning appeals, as the direct access provision is available only to one without such notice. There is a compelling reason for forcing one with actual notice of the issuance of the permit to appeal first to the board, as one with such notice is able to examine the plans for the building and determine whether, in his opinion, the proposed construction is in conformance with the zoning ordinance. The statute thus places upon him the duty to make inquiry and air his grievances at the earliest possible time. Similarly, one without actual notice of the issuance of the permit has the same duty of inquiry and action when construction actually begins.

60. See note 8 and accompanying text *supra*.

E. Staged Permits

Quite often, permits for the construction of a complex commercial building are issued at different times for different phases of construction. For example, a permit allowing the erection of the shell of the building may be issued two months after the permit allowing excavation. It may well be that a person would have no objection to the excavation, but would contend that the shell violated the zoning ordinance in some respect (*e.g.*, exceeded the height limitation). Consequently, he would not have notice of the condition which he claims violates the ordinance within thirty days of the issuance of the original permit. In this circumstance, it is believed that the thirty day period for appeals to the board begins running from the issuance of each permit with regard to matters covered by the particular permit. The same cannot be said of the fifteen day limitation contained in the direct access provision as, on the face of the statute, it is keyed only to the start of construction and makes no mention of particular phases of construction. Again, this would be a logical result, as it is not unfair to require that once construction begins, an individual has the duty to make inquiry with regard to the different phases if he has some notion of privately enforcing the zoning ordinance. If such inquiry is diligently made, he then would have actual notice of the issuance of subsequent building permits at the time of issuance, and could appeal to the board of zoning appeals and then to the appropriate court of record.

Suppose that more than fifteen days after construction has begun, an individual discovers that the building is being constructed in violation of the plans upon which the building permit was issued. In this instance, he simply has no remedy under any relevant zoning statutes and must rely upon local officials to enforce the ordinance. Should the practitioner be faced with this situation, he should investigate the availability of the writ of mandamus should the officials refuse to act.

F. Standing to Bring Suit

Standing to file suit under the direct access provision of section 15.1-496 appears to be quite flexible—the only apparent requirement is that the person have no actual notice of the issuance of a building permit. On the face of the statute, there is not even a requirement that the person be a resident of the locality in which

the building is being constructed. Compare this with the mandate that in order to appeal a decision of the zoning administrator to the board of zoning appeals, the complainant must be a "person aggrieved,"⁶¹ indicating a general requirement that there be some adverse effect on his property rights stemming from the decision appealed.⁶² Surprisingly, standing is relaxed under section 15.1-497 for an appeal from the decision of the board of zoning appeals to a court of record, and "any taxpayer," as well as a "person aggrieved," may perfect such appeal.⁶³ Although the term "any taxpayer" indicates that the individual must be a property owner, it does not require that his property be affected by the decision. The result is the anomalous situation of a person being able to appeal a decision of the board of zoning appeals who had no standing to bring the matter before the board in the first place. A literal reading, therefore, of the standing requirements of the direct access provision and that authorizing an appeal of a decision of the board of zoning appeals raises serious questions as to the validity of these sections of the enabling acts.

It has been demonstrated that zoning is a legislative power residing in the state and that the enactment and enforcement of zoning regulations is an exercise of the sovereign power of the state.⁶⁴ Although this enforcement power may be delegated to cities, counties and towns, reported decisions say nothing of delegation of enforcement powers to private citizens. In fact, the cases specifically hold that it belongs to the legislative department to exert police powers and that delegation of such powers is permitted only to municipalities and other governmental subdivisions of the state.⁶⁵

Unquestionably, the General Assembly could not, under the Virginia Constitution, delegate the decision-making aspect of its legis-

61. VA. CODE ANN. § 15.1-496 (Repl. Vol. 1973).

62. See Note, *The Aggrieved Person Requirement in Zoning*, 8 WM. & MARY L. REV. 294 (1967). One is immediately reminded of the "special and distinct harm" language in the cases which define the standing of a private citizen to sue for public nuisance. See text accompanying notes 14-22 *infra* and following note 68 *supra*.

63. VA. CODE ANN. § 15.1-497 (Repl. Vol. 1973). The petition must be filed with the appropriate court of record within thirty days after the filing of the decision in the office of the board.

64. See note 9 *supra*.

65. *Id.* Webster Sanitation Comm'n v. Craft, 196 Va. 1140, 87 S.E.2d 153 (1955); *Town of Farmville v. Walker*, 101 Va. 323, 43 S.E. 558 (1903).

lative powers to a private citizen.⁶⁶ It is believed that the same holds true for wholesale delegation of the right to enforce regulations enacted pursuant to the police power. Consequently, a purported delegation of the right to file suit to enforce a zoning regulation (or appeal a decision of the board of zoning appeals) to one who will derive no direct benefit from a favorable decision nor suffer any special detriment from an adverse ruling (*i.e.*, one who is not a "person aggrieved") is void. This conclusion is consonant with the decisions holding that in order to have standing to challenge the constitutionality of a zoning ordinance, the plaintiff has the burden of showing that he, and not some other person or the public at large, will be injured.⁶⁷

In light of the above, counsel for a complainant (who may be, in fact, a "person aggrieved"), may be faced with the unenviable task of persuading a judge to engraft upon the statutes the "person aggrieved" requirement with regard to standing to sue. If such were done by the court, sections 15.1-496 and 15.1-497 could survive an attack which claimed that they represent an unlawful delegation of police powers. The glib argument which immediately comes to mind is that the statute should be upheld if possible and the "person aggrieved" is implied and consistent with the "spirit and purpose" of the act. While "spirit and purpose" arguments lie well in lofty intellectual discussions, they offer little comfort to the practitioner who has been fixed with an icy stare from the bench and ordered to "Tell me what the statute says—forget this spirit and purpose nonsense." It is feared that if the statutes are literally interpreted, they are invalid. Whether the courts are willing to indulge in a bit of judicial legislation to engraft the requisite standing criteria by implication remains to be seen.⁶⁸

66. VA. CONST. art. IV, § 1. See also *Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Standard Drug Co. v. General Elec. Co.*, 202 Va. 367, 117 S.E.2d 289 (1961).

67. *Kenyon Peck, Inc. v. Kennedy*, 210 Va. 60, 168 S.E.2d 117 (1969); *Fairfax County v. Parker*, 186 Va. 675, 44 S.E.2d 9 (1947).

68. An analogy might be drawn to Judge Dalton's opinion in *St. Clair v. Righter*, 250 F. Supp. 148 (W.D. Va. 1966), which dealt with the exercise of jurisdiction under Virginia's "long arm" statute. Judge Dalton reasoned that courts have inherent power to exercise their jurisdiction to the limits of due process. Any statute which purported to extend the power beyond those limits would, of course, have no effect. Virginia's statute did not approach the limits of due process in providing for extra-territorial jurisdiction and did not, by its terms, state that jurisdiction was confined to the limits of the statute. The court interpreted the act

Throughout these discussions we are inexorably drawn back to the "special and distinct harm" required for standing to sue for public nuisance. The question becomes not so much whether the legislature has sanctioned the particular cause of action (for the legislature can go only so far in delegating its police powers), but whether an interest has been invaded which, apart from any zoning regulations, the law recognizes and protects. This concept will be further discussed in the text accompanying notes 75-86 *infra*, which deals with the right to file suit to enjoin a violation of the zoning ordinance in those situations not covered by section 15.1-496.

One further point relative to standing bears brief mention. Since it has been held that use and building permits issued in violation of a zoning ordinance are absolutely void, how can any time limitation be placed upon the right of a private citizen to challenge construction of the particular building involved (assuming now that the direct access provision of section 15.1-496 is valid)? Certainly the passage of fifteen days does not magically transform a void permit into a valid one. The simple and, it is believed, correct answer is that while the permit is still void, a private citizen simply has no standing to challenge it after the expiration of the fifteen day period. That right resides solely in the local authorities, who are not hampered by the doctrines of laches and estoppel which plague mortal men.⁶⁹ Along these lines, it would appear that the decisions which hold that a person acquires some vested rights in use and building permits are predicated upon the assumption that such permits are validly issued in conformance with the zoning laws. The rights are vested only as against an attempted change in the ordinance or regulations after the permits, if valid, have been issued.⁷⁰

as sanctioning the exercise of jurisdiction *at least* to the limits set out therein and providing objective guidelines with regard to acts which would subject a non-resident to the power of Virginia courts. The question, therefore, was not so much concerned with the effect of the codification of jurisdictional acts but with the inherent jurisdictional power of courts, as limited by due process.

69. VA. CODE ANN. § 15.1-491 (Repl. Vol. 1973). See also *Segaloff v. City of Newport News*, 209 Va. 259, 163 S.E.2d 135 (1968).

70. *Board of Supervisors v. Cities Service Oil Co.*, 213 Va. 359, 193 S.E.2d 1 (1972); *Board of Supervisors v. Medical Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799 (1972). A prohibition against impairment of vested rights has always been present in the zoning laws and is presently found in VA. CODE ANN. § 15.1-492 (Repl. Vol. 1973).

It is happily beyond the scope of this article to discuss in detail the situation which obtains when a local governing body issues use and building permits, allows the structure to be

G. When Has Construction Started Within the Meaning of Section 15.1-496?

Since both use and building permits automatically expire after a given period of time unless construction has commenced, the zoning administrator generally must make a determination in this regard. Such determination will depend upon the facts and circumstances of each case. It has been held that construction has not begun until building materials are "united together on the site."⁷¹ However, it would be a mistake to read that decision as an inflexible rule of law, as the Virginia Supreme Court was obviously governed by the particular facts and circumstances before it, and made it clear that the appropriate test was whether the builder was proceeding with diligence.⁷² Merely running a bulldozer over the ground and then remaining idle for six months would probably be construed as a ruse, engaged in for the purpose of attempting to prevent the permits from expiring. It would seem equally clear that the excavation of an underground parking garage for a high rise office building should normally be considered the start of construction, even though the shell of the building had not been commenced. In general, if it appears from a view of the site that the original intention to build has not been abandoned, construction has commenced within the meaning of local ordinances and section 15.1-496.⁷³ Therefore, if a citizen desires to avail himself of the direct access provisions of section 15.1-496, he would be well advised to assume that construction has commenced as of the day that any activity on the construction site begins, and govern himself accordingly with regard to the fifteen-day limitation.

completed and then orders it demolished as a violation of the zoning laws. Suffice it to say that, although the current state of the law would seem to permit this, there should come a time when, absent fraud, an individual's rights in this type of situation do, in fact, vest, and are not subject to attack from any front. This idea has precedents in other areas of Virginia law. For example, Virginia's Antitrust Act immunizes private conduct which, though the acts themselves may violate the antitrust laws, was undertaken pursuant to approval by a state or federal agency. VA. CODE ANN. § 59.1-9.4(b) (Cum. Supp. 1974).

71. *McClung v. County of Henrico*, 200 Va. 870, 108 S.E.2d 513 (1959).

72. The facts of *McClung* revealed that the only "construction" which had begun prior to the date of expiration of the building permit involved work for which a building permit was not required.

73. *McClung v. County of Henrico*, 200 Va. 870, 877, 108 S.E.2d 513, 518 (1959).

H. Burden of Proof

If, as previously contended,⁷⁴ section 15.1-496 is an exclusive, mandatory remedy, and its provisions are jurisdictional, the burden would be on the complainant to allege and prove facts showing compliance with the requirements of the statute. Failure to allege such facts would be demurrable, since noncompliance with the statute would not be a matter of affirmative defensive pleading.

V. AVAILABILITY OF INJUNCTIVE RELIEF IN SITUATIONS NOT COVERED BY SECTION 15.1-496

As a final consideration, it must be determined whether a private citizen may invoke the general equitable remedy of injunction to enforce a zoning ordinance in situations which are not covered by section 15.1-496.

As previously mentioned, the Supreme Court of Virginia has rendered no decision in this area, either with or without reference to the statute. Courts in several other states have considered the availability of injunctive relief to a private citizen desiring to enforce a zoning ordinance but, from the limited material available, it would appear that no cases have been decided in the context of a statute, such as section 15.1-496, in which the legislature has specifically granted direct access to the courts.⁷⁵

The rationales of the various decisions have been quite varied and appear on their face to lack consistency. Some states, by statute, have made a violation of a zoning ordinance a nuisance, while others have judicially held it so on the theory that, although the erection of the structure may not in itself constitute a nuisance, it becomes so when erected in a place or a manner forbidden by law.⁷⁶ One court has even constructed a third party beneficiary theory, stating that the benefit derived from enforcing zoning laws accrues to abutting property owners as well as the town.⁷⁷ Other states have held that a

74. See text accompanying notes 37-55 *supra*.

75. See *O'Brien v. Turner*, 255 Mass. 84, 150 N.E. 886 (1926), and *Whitridge v. Calestock*, 100 Misc. 367, 165 N.Y.S. 640 (1917). Both allude to statutes which provide certain remedies. Both cases, however, hold that the courts will not restrain violations of zoning ordinances unless special and "private" harm can be shown.

76. See 3 RATHKOPF, *THE LAW OF ZONING & PLANNING* at 66-4,5 (3d ed. 1972), and cases cited therein.

77. *Pritz v. Messer*, 112 Ohio St. 628, 149 N.E. 30 (1925). Even this broad holding, however,

suit in equity may be maintained only for redress of property rights and that an individual's interest in his neighbor's obedience to statutes or ordinances is not such a property right.⁷⁸ Whatever the stated rationale, in virtually all of the decisions from other jurisdictions, courts have alluded to the public nuisance requirement that the plaintiff suffer some special and distinct damage, different in kind and degree from the public at large.⁷⁹

Regardless of what other states may have done under similar circumstances, it is doubtful that the Virginia Supreme Court would hold that, in the absence of statute, a private citizen has any right to enforce a zoning ordinance by an action for injunction. Consequently, a private citizen would have no cause of action for any situation which does not fall within the purview of that statute.⁸⁰

requires that the plaintiff be a person whose property is affected, or a "person aggrieved."

78. *Mullholland v. State Racing Comm'n*, 295 Mass. 286, 3 N.E.2d 773 (1936); *Srager v. Mintz*, 109 N.J.Eq. 544, 158 A. 471 (Ct. Err. & App. 1932). See also *YOKLEY*, *supra* note 10, § 10-6, at 443 ("Adjacent land owners have no private rights by statute or otherwise to enforce the zoning laws on the land of a neighbor.").

79. *Compare Fitzgerald v. Merard Holding Co., Inc.*, 106 Conn. 475, 138 A. 483 (1927) (injunction would lie as plaintiff had shown special and peculiar damages, different from the public at large) with *Lehmaier v. Wadsworth*, 122 Conn. 571, 191 A. 539 (1937) (failure to show special damages precluded plaintiff from filing an action to enjoin violation of a zoning ordinance). *Compare Rice v. Van Vranken*, 225 App. Div. 179, 232 N.Y.S. 506 (1924) (showing of direct financial loss entitled plaintiff to maintain an action for injunction) with *Atkins v. West*, 222 App. Div. 308, 226 N.Y.S. 335 (1928) (plaintiff could not maintain an action for injunction since there had been no showing of any special damage or injury to property). See generally *YOKLEY*, *supra* note 10, § 10-6, at 442-43, asserting that a court of equity has jurisdiction to grant injunctive relief against the violation of a zoning ordinance only when a citizen avers and proves an injury peculiar to himself and not in common with others in the neighborhood.

80. If § 15.1-496 provides an exclusive and mandatory remedy for those situations which fall within its purview, a compelling argument can be made that, by providing some remedy, the legislature meant to exclude all others. Nor is it believed that § 15.1-499 grants *carte blanche* to a private citizen to enjoin violations of the zoning ordinance. Quite apart from the fact that such an interpretation would render the fifteen day limitation in § 15.1-496 meaningless, its predecessor statutes were concerned with granting local officials the power to institute appropriate proceedings to prevent unlawful construction, alteration or repair of a building or unlawful use of land or premises. VA. CODE ANN. § 2880tt & 3091(22) (1942); *Id.* §§ 15-840 & 15-851 (1950). In 1962, the statute was amended to delete references to local authorities and incorporate the present language. *Id.* § 15-969 (Cum. Supp. 1962).

It might be argued that the deletion of references to local officials indicated an intent to make the remedy available to all citizens in cases arising under zoning ordinances. However, it seems more logical that the legislature meant to indicate that in situations where access

As a prefatory comment, it would be well to remember that the mere fact that a case provides a proper subject for equitable relief does not, in and of itself, mean that the entire panoply of equitable remedies is automatically available to the complainant. For example, an injunction will not issue in every case of nuisance or continuing trespass, for the court is bound to consider both the interest of the parties and the interest of the public. If the harm an injunction would cause the defendant is out of proportion to the injuries complainant seeks to remedy, the injunction will be denied.⁸¹ It is easy for practitioners to lose sight of this basic fact, particularly as one becomes convinced that truth and justice are squarely in his corner, and to forget that his burden is not only to convince the court of his client's right to redress, but also that the facts of the case warrant injunctive relief.

An injunction is granted to protect existing rights or liens from irreparable injury, and does not create any new lien or give rise to a new substantive right.⁸² Therefore, in the absence of any statute giving a private citizen the right to enforce a zoning ordinance, the burden is on the complainant to show that he has a common law cause of action for redress of the particular invasion. This, of course, places us back in the category of common law nuisance.

The closest analogy which can be drawn from the reported Virginia decisions involves those cases in which a private citizen has attempted to enforce a local ordinance other than a zoning ordinance. It has been held many times that equity will not restrain an act merely because it is in violation of a criminal statute or local ordinance, but where the violation results in special injury to property rights, and monetary damages are difficult or impossible to ascertain, an injunction will issue.⁸³ Virginia requires an exception-

to the courts was otherwise granted, such as in § 15.1-496, the remedy of injunction was available. See *McNair v. Clatterbuck*, 212 Va. 532, 186 S.E.2d 45 (1972), which involved an action filed by the zoning administrator to enforce the ordinance. The court held that § 15.1-499 supplemented § 15.1-491 and gave the trial court jurisdiction to grant an injunction even though the local ordinance did not expressly provide for its enforcement by injunction.

81. *Seventeen, Inc. v. Pilot Life Ins. Co.*, 215 Va. 74, 205 S.E.2d 648 (1974); *Akers v. Mathieson Alkali Works*, 151 Va. 1, 144 S.E. 492 (1928).

82. *Deeds v. Gilmer*, 162 Va. 157, 174 S.E. 37 (1934).

83. *Woodfin v. Overnight Transp. Co.*, 199 Va. 165, 98 S.E.2d 525 (1957); *Mears v. Town of Colonial Beach*, 166 Va. 278, 184 S.E. 175 (1936); *Turner v. Hicks*, 164 Va. 612, 180 S.E. 543 (1935); *Long's Baggage Transfer Co. v. Burford*, 144 Va. 339, 132 S.E. 355 (1926); *Landon*

ally strong showing of standing in such cases. For example, it has been held that even though the location or operation of a particular activity may adversely affect the property of others, such is not per se a ground for complaint.⁸⁴ In another case,⁸⁵ the defendant, whose property adjoined that of the complainant, constructed a building of materials which violated the town fire ordinance, and complainant sought to have the construction enjoined. He proved to the satisfaction of the court that the illegal construction both increased the risk of fire to his premises and caused his insurance premiums to be raised. After stating the general rule that equity will not restrain violation of a local ordinance unless special and irreparable injury to private property is shown, the court held that the facts of the case would not support injunctive relief. The complainant depended entirely upon the ordinance for his standing, since the act complained of was not a nuisance and not unlawful in the absence of the ordinance, and a private citizen cannot call upon a court of equity to exercise discretion which properly rests with the town council.⁸⁶

It is submitted that Virginia's approach in this general area is much sounder than that of certain other states, which seem obsessed with the idea that a private citizen must have the right to enforce a zoning ordinance. As a result, we are witness to frantic efforts to fit square pegs into round holes as courts attempt to convince themselves that somehow the common law has always contemplated that, if and when zoning laws were enacted, private citizens would have the right to enforce them by injunction. At times, "nuisance" is treated as if it were a four letter word, as the courts struggle with situations arising under the zoning laws which do not always fit neatly into the traditional definition of a nuisance. Yet the criteria established under the zoning decisions invariably in-

v. Kwass, 123 Va. 544, 96 S.E. 764 (1918). It is particularly interesting to note that in *Mears* it was the town which was denied the right to enjoin defendant from constructing a pier and operating a beer garden in violation of the town ordinance.

84. *Daniel v. Kosh*, 173 Va. 352, 4 S.E.2d 381 (1939).

85. *Landon v. Kwass*, 123 Va. 544, 96 S.E. 764 (1918).

86. For other decisions holding that equity will not, at the behest of a private citizen, interfere by injunction with the exercise of discretionary powers with which local officials are clothed, see *Shield v. Peninsula Land Co.*, 147 Va. 736, 133 S.E. 586 (1926); *Ferguson v. Board of Supervisors*, 133 Va. 561, 113 S.E. 860 (1922).

volve special and distinct harm. This approach is reminiscent of the problems inherent in the inflexibility of the ancient English law writs which fostered the development of equity.

The proper inquiry is not whether, in the absence of statute, a private citizen may sue to enjoin violations of a zoning regulation. Stated in those terms, of course he cannot, and decisions which attempt to manufacture such a right are fraught with the danger of establishing poor precedents. Standing to sue should in no way be predicated upon the violation of an ordinance. Rather, the inquiry should be directed towards whether the act complained of invades a protected right of the complainant for which equity will afford relief, regardless of whether the act violates one or more ordinances. The special and distinct harm standing criteria, coupled with the long established principles relating to the issuance of injunctions, seem to provide a good foundation for the protection of the aggrieved citizen.

VI. SUGGESTED CHANGES

One of the best established maxims of our profession is that a lawyer should never ask a question to which he does not know the answer. This article has flagrantly violated that sage precept, as we still lack judicial guidelines in this specific area upon which to base our conclusions. It was not the purpose of the article to nit pick at the statutes and, in so doing, administer something of a verbal wrist tap to the General Assembly, but rather to suggest that there are some areas where changes made now may avoid a great deal of confusion in the courts later. It is therefore respectfully suggested that the following would be beneficial:

(1) Repeal section 15.1-499. It was originally intended to provide enforcement powers to local officials which are now adequately covered in section 15.1-491. If it is believed necessary, the remedy of injunction could be specifically set out in the direct access provision of section 15.1-496. However, the continued existence of section 15.1-499 engenders a great deal of confusion as regards its intended effect and application.

(2) Delete "any taxpayer" from section 15.1-497.

(3) Place the direct access provisions of section 15.1-496 in a separate section (perhaps section 15.1-496.1) and provide;

(a) that in order to bring an action, an individual must be a "person aggrieved," or words of like effect;

(b) that actual notice of the issuance of the building permit refers to notice at the time of issuance;

(c) that the statute provides an exclusive remedy and is mandatory and jurisdictional.

Regardless of how carefully any piece of legislation is drawn, there will always be questions concerning its construction, interpretation and effect. Were the situation otherwise, we could drape judicial robes on a computer and lawyers would be out of business. It is believed, however, that the changes suggested would be helpful in clarifying rights and limitations in the area of private enforcement of zoning laws, and would provide ample protection and redress for all "persons aggrieved."

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